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FULFILLING THE PROMISE OF THE NATIONAL LABOR RELATIONS ACT: A REVIEW OF *TAKING BACK THE WORKERS' LAW*

BY ANN C. HODGES

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Labor is prior to and independent of capital. Capital is only the fruit of labor and could never have existed if labor had not first existed. Labor is the superior of capital and deserves much the higher consideration.¹

Ellen Dannin's excellent book, *Taking Back the Workers Law*, reminds us of the importance of labor as reflected in the enactment of the National Labor Relations Act in 1935. In these days when private sector union membership has declined to the single digits,² this is a timely reminder. Of course, scholars and unionists have bemoaned this decline for years, theorizing about its causes and proposing various fixes, most requiring legislative change or alternatives to legal strategies.³ While some nonlegal strategies, such as the Justice for Janitors organizing campaign, have been effective,⁴ legislative change is highly unlikely. Professor Dannin instead focuses on the promise of the National Labor Relations Act (NLRA) as written. Those who have labored in the trenches of the NLRA for years, many of whom have come to view the Act as an obstacle rather than an aid, will

benefit from this re-visioning of the NLRA. In 1935, Congress firmly declared:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by protecting the exercise by workers of the full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.⁵

While this inspirational vision of the Act has never been fully realized, it remains the law and Dannin offers a strategy for making it real. The power of her analysis is two-fold. It requires no legislative change and it injects a note of optimism into the often depressing world of labor law. It should be required reading for all who fight to advance the cause of labor.

JUDICIAL DECISIONS CRUCIAL

The book is somewhat loosely organized, but so packed with valuable information that one hardly notices. Dannin begins her discussion by analyzing the impact of judicial interpretation on the law. She emphasizes that judicial decisions are crucial to the enforcement of labor law, whether the current version or any new legislation. The NLRA was a radical revision of the common law, limiting the employer's property rights and right to act unilaterally, including the right to terminate at will and set pay and benefits. Yet the new law was generally written, leaving room for interpretation by the expert agency it created, the National Labor Relations Board, and, on appeal from the Board, by the courts. As a result of this general language, the interpretations of the judges, informed by their traditional legal assumptions rather than the fundamentally altered vision of the NLRA, restricted the broad statutory change intended by Senator Wagner and the Congress.

Dannin does not view these existing decisions as impossible obstacles, however, pointing to the success of the NAACP Legal Defense Fund in reversing negative precedent against far more daunting odds. For the remainder of the book, she lays out a litigation strategy designed to return the NLRA to the worker-centered vision that animated its passage. The basic elements of the strategy are as follows: 1. Focus litigation on the purposes and policies of the statute; 2. Use expert testimony, scholarly research and other evidence to educate judges how particular decisions will further the purposes of the statute and others will impair them; 3. Anticipate the concerns of judges unschooled in labor law and adapt the litigation strategy, including choice of cases to appeal, to meet those concerns.

Dannin recognizes that the task that she lays out is not an easy one. Accordingly, she spends time illustrating the process with specific examples. First she demonstrates that the policies of the NLRA, which may initially seem radical, are in fact quite consistent with

American democratic values such as freedom of association, collective good and widespread participation in governance.⁶ Emphasis on these values and their primacy in American life will help judges make more balanced decisions when workers' rights clash with employers' rights to control their property and their business. Dannin uses examples of previous cases to show how judges have ignored or slighted the NLRA policies by placing great weight on employer rights and how an alternative vision might have accomplished the purposes of the NLRA. Her examples will be quite familiar to scholars and practitioners of labor law—among them *Lechmere*,⁷ *Darlington*,⁸ *Adkins Transfer*,⁹ *Mackay Radio*.¹⁰

INEFFECTIVE REMEDIES

Dannin goes far beyond mere criticism of these cases, however. She offers practical advice on how to lead judges to different results. Litigators, she suggests, must introduce evidence that calls the attention of judges to the employee and societal rights at stake, making these rights real to the judges by relating them to their own experiences. Further, the attorneys must demonstrate how what happens in the workplace impacts society and therefore, how the NLRA's policies benefit society as a whole. Cases must be tried with an eye to the stereotypes that judges may hold and what evidence might be offered to overcome those stereotypes.

Dannin maintains a particular focus on remedies, and for good reason. The NLRB has broad discretion in ordering remedies¹¹ and the current ineffective remedies have been the subject of widespread criticism. Thus, she offers both substantive and procedural recommendations for obtaining novel

remedies that more effectively accomplish the purposes of the Act.

Another valuable aspect of the book is its emphasis on the clear language of the statute. Given the current judicial trend of textualism,

the reminder that the language of the NLRA is actually quite favorable to unions and collective bargaining is timely and welcome. As just one example, she points out that we have come to think of Section 8(c)¹² as an exculpatory provision for anti-union employers to evade liability. Yet the words of the provision merely limit the use of certain speech as evidence of an unfair

labor practice, neither providing any affirmative speech right nor specifying that it belongs to employers. The widespread understanding of the provision as giving free speech rights to employers, so at odds with its language, limits the ability of unions and their representatives to use Section 8(c) creatively to protect the rights of unions and employees.

In addition to her recommendations regarding substantive changes in the law, Dannin spends several chapters on the procedural aspects of NLRB cases, from the filing of the charge through the hearing and appeal. Again, she offers extremely useful practical information about working with the NLRB. The seasoned practitioner, the novice union representative and everyone in between will find valuable information in these chapters. She clearly explains to the nonlawyer how a court can legitimately reach different conclusions on similar facts, or reverse precedent. Dannin goes on to illustrate how this can be a benefit to unions faced with negative interpretations of the statute. She personalizes the NLRB and its employees for the union official who has heard only general negative press about the agency.

THE NLRA WAS A RADICAL REVISION OF THE COMMON LAW, LIMITING THE EMPLOYER'S PROPERTY RIGHTS AND RIGHT TO ACT UNILATERALLY, INCLUDING THE RIGHT TO TERMINATE AT WILL AND SET PAY AND BENEFITS.

She recommends specific techniques that will help in getting complaints issued and cases tried. For example, she recommends that solicitors of union authorization cards supporting election petitions witness the card signings by initialing and recording the date, time and place of signing, which will make it easier to authenticate the cards if there is a legal challenge. For the attorney, she explains how and when to raise novel theories of the law and how to intervene in proceedings before NLRB administrative law judges. In the end, she offers a valiant defense of the NLRB as an agency that is trying to do the right thing under difficult circumstances and encourages unions to use, not abandon, the agency.

COORDINATION OF LEGAL STRATEGY

Taking Back the Workers' Law is a call to action for workers and their advocates to return to first principles of the NLRA and to use the law creatively to full advantage. Recognizing the difficulty of the mission, Dannin's book invites the beginning of a campaign to reclaim the law for workers rather than providing a solution to the problem of lost worker rights.

Dannin's optimistic view of the NLRA's possibilities is a refreshing development in the scholarly analysis of the NLRA, which has focused on its faults. Nevertheless there are difficulties in her suggested approach which are perhaps not fully acknowledged. Certainly the NAACP Legal Defense Fund faced far more difficult odds in its legal challenges to segregation in the mid-twentieth century. Yet at the same time, it had far more control over the cases that were actually litigated for the

same reasons that its task was so difficult. Few clients and attorneys had the resources and ability to litigate in the hostile courts. Today there are a multitude of unions and workers'

ANOTHER VALUABLE ASPECT OF THE BOOK IS ITS EMPHASIS ON THE CLEAR LANGUAGE OF THE STATUTE. GIVEN THE CURRENT JUDICIAL TREND OF TEXTUALISM, THE REMINDER THAT THE LANGUAGE OF THE NLRA IS ACTUALLY QUITE FAVORABLE TO UNIONS AND COLLECTIVE BARGAINING IS TIMELY AND WELCOME.

rights organizations, each with their own political and economic agenda and their own attorneys and resources for litigation.¹³ While the AFL-CIO maintains a Lawyers' Coordinating Committee¹⁴ and makes some effort to coordinate legal strategy, particularly in cases appealed to the U.S. Supreme Court, ultimately each member union decides how and when to litigate. The labor movement split which led to the creation of the Change to Win coalition

almost certainly made coordination of legal strategy even more difficult.¹⁵ Those hard cases that make bad law may be even more likely to reach the courts today.

Litigation under the Americans with Disabilities Act¹⁶ illustrates the problem of controlling litigation to influence legal interpretation of legislation. The NAACP LDF, along with other civil rights groups, and a coalition of women's advocacy organizations strongly influenced the interpretation of civil rights legislation based on race and gender through their coordinated litigation efforts.¹⁷ As a result much favorable legal precedent was developed. In contrast, ADA litigation has been undertaken by a multitude of different disability rights organizations with differing interests because of their representation base, in addition to many private attorneys, some with employment law expertise and some without. The vastly increased number of lawyers and the potentially broad definition of disability necessarily resulted in a larger number of cases under the statute. Cases interpreting the ADA have overwhelmingly favored employers.¹⁸ One

of the best examples of "hard cases make bad law" is *Sutton v. United Air Lines* where the plaintiffs sued claiming their nearsightedness was a disability, seeking to become commercial air line pilots.¹⁹ The specter of millions of nearsighted employees alleging disability discrimination led the Supreme Court to interpret the coverage of the statute in a very narrow fashion, to the detriment of many individuals suffering from serious medical problems which led to adverse actions by their employers.

An additional difficulty which Dannin does not confront head-on is the problem of getting complaints issued by conservative general counsels. Unlike the civil rights laws, the NLRA limits litigation to those cases in which the General Counsel decides to issue a complaint.²⁰ Appointments of Board members and the General

Counsel, like other government appointments, have become increasingly partisan in recent years.²¹ More partisan appointments result in more partisan decisions.²² While this may benefit unions during Democratic administrations, it makes it more difficult to obtain complaints and favorable decisions on novel theories during Republican administrations.²³ Perhaps, however, Dannin's recommendations are the best that can be offered without merely repeating the simplistic prayer for more political activism to elect pro-labor candidates or tackling the far more complex and broader task of reducing partisan wrangling in government. If unions can present more carefully prepared cases to the investigators, support creative theories with arguments based on the Act's policies, convince Regional Directors to issue investigative subpoenas, and press for more effective remedies in those cases where complaints are issued, the law may develop more favorably even during Republican administrations.

These caveats suggest only that the strategy that Dannin recommends may have some limitations. Despite the limitations, however, it offers a positive vision for what could be achieved under the NLRA and some practical suggestions for making it work. Even small victories using this strategy would significantly improve the utility of the statute.

And such victories might unleash the creativity of union activists and direct it to legal reform.

One additional point worth mentioning is that the book is written for multiple audiences, including union officials and attorneys who practice in the field. Because of the need to make the book comprehensible for the nonlawyer, the experienced legal practitioner and scholar may be able to skim some sections which cover familiar territory. I found the sections written for the lay audi-

ence enlightening, however, for Dannin has a remarkable facility for explaining complex legal concepts so that the reader not only understands the how, but also the why, of the law and the judicial process. Additionally, excessive skimming may cause the reader to miss the valuable nuggets of information and sparks for creative thinking that are sprinkled throughout the text.

CONCLUSION

Advocates for unions and for the collective bargaining system set up by the NLRA will be heartened by Dannin's book. It will recall the passion that inspired them to believe in a society where labor is valued and people work together for the collective good. And perhaps it will motivate some of them to put aside the doomsday visions and make labor law reform through litigation strategy one pillar of the effort to revitalize the labor movement. ▲

**UNLIKE THE CIVIL RIGHTS LAWS,
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ENDNOTES

- ¹ Abraham Lincoln, First Annual Message to Congress, December 3, 1861.
- ² Union membership among private sector nonagricultural workers declined from 24.6% in 1973 to 7.9% in 2005. Barry T. Hirsch and David A. Macpherson, *Union Membership and Earnings Data Book* 13 (2006).
- ³ For discussion of some of the scholarly commentary on the decline of unionization and various remedial proposals, see Ann C. Hodges, *Mediation and the Transformation of the American Labor Movement*, 69 Mo. L. REV. 365, 367, 377-83 (2004). See also Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1591-1611 (2002).
- ⁴ See Christopher L. Erickson, et al., *Justice for Janitors in Los Angeles: Lessons from Three Rounds of Negotiations*, 40 BRITISH J. OF INDUS. REL. 543 (2002).
- ⁵ National Labor Relations Act, Section 1, 29 U.S.C. § 151.
- ⁶ Dannin also suggests using international law and the laws of other countries to support arguments under the NLRA. Although controversial, international law is increasingly considered by American judges. For an example of the debate, see *Roper v. Simmons*, 543 U.S. 551, 575-76, 604-05, 622-28 (2005) (setting forth the diverse views of the various justices on the use of international law by American courts).
- ⁷ *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (giving employers wide latitude to exclude union organizers from their premises).
- ⁸ *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) (stating that employers are free to close their doors because their employees unionize, with very limited exceptions).
- ⁹ *NLRB v. Adkins Transfer Co.*, 226 F.2d 324 (6th Cir. 1955) (allowing employer to shut down a department because the employees chose union representation which would increase the employer's costs).
- ¹⁰ *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (stating that employers can permanently replace striking employees).
- ¹¹ NLRA, Section 10(c), 29 U.S.C. § 160(c).
- ¹² 29 U.S.C. § 158(c).
- ¹³ For unions affiliated with the AFL-CIO, see *Unions of the AFL-CIO*, <http://www.aflcio.org/aboutus/unions/> (last visited July 12, 2006). For those affiliated with Change to Win, see *Change to Win, Who We Are*, <http://www.changetowin.org/members.html> (last visited July 12, 2006).
- ¹⁴ See AFL-CIO Lawyers Coordinating Committee, <http://lcc.aflcio.org/index.cfm> (last visited July 12, 2006).
- ¹⁵ See Clarence R. Deitsch & David A. Dilts, *Gompersian Organizational Principles: The Summer of Labor Discontent*, 57 LAB. L.J. 83 (2006); *AFL-CIO's Sweetney Angered by Defection of Dissident Unions as Convention Kicks Off*, DAILY LAB. REP. No. 142, July 26, 2005 at AA-2.
- ¹⁶ 42 U.S.C. § 12101 *et. seq.*
- ¹⁷ For histories of these efforts, see Helen Herskoff & David Hollander, *Rights into Action: Public Interest Litigation in the United States in Many Roads to Justice: the Law Related Work of Ford Foundation Grantees Around the World* 89-125 (Mary McClymont & Stephen Golub, eds. 2000); Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (1994).
- ¹⁸ Amy L. Allbright, *2004 Employment Decisions Under the ADA Title I -Survey Update*, 29 MENTAL AND PHYSICAL DISABILITY LAW REPORTER 513 (2005) (reporting that annual surveys of ADA employment cases revealed that employees prevailed in the courts in 3% or fewer of the cases from 2002-2004, a reduction from the 8% employee victories in the first annual survey in 1997); Ruth Colker, *Winning and Losing Under the Americans With Disabilities Act*, 62 OHIO ST. L.J. 239 (2001) (discussing the dismal record of plaintiff success in ADA cases).
- ¹⁹ 527 U.S. 471 (1999).
- ²⁰ See NLRA Section 10, 29 U.S.C. § 160; *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (noting the General Counsel's unreviewable discretion to determine whether to issue complaint).
- ²¹ Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361 (2000). See also, Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707 (2006).
- ²² *Id.* at 1366.
- ²³ Notably, however, far more former management representatives have been appointed to these positions than former union representatives, even in Democratic administrations. *Id.* at 1367-98; Turner, *supra* n. 21, at 763-764 (listing the background of Board members appointed by presidents from Eisenhower through George W. Bush).